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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, Secretary of the United States Department of the Interior, *et al.*,

Petitioners,

vs.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AS *AMICUS CURIAE* OF THE ENVIRONMENTAL LAW COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Environmental Law Committee (the "Committee") of The Association of the Bar of the City of New York (the "Association") files this brief as *amicus curiae* with the approval of the Association and the consent of all parties, urging that the judgment below of the United States Court of Appeals for the District of Columbia Circuit be reversed.

The Committee is one of the standing committees of the Association, a voluntary bar association with more than 20,000 members. The Committee was founded due to the growing importance of environmental law to the City and to the Nation. The Committee, comprised of lawyers representing in their personal practices diverse private, governmental, academic and not-for-profit clients, endeavors to reflect considered, non-partisan views on matters of public policy. Since its inception, the Committee has actively participated in the consideration, development and interpretation of much of the proposed legislation and regulation in the environmental field.

The decision below, addressing application of the Endangered Species Act to protect the critical habitat of endangered or threatened animals, and this Court's review of that decision, are of exceptional social and legal importance. This Court's final determination with respect to the statutory provisions at issue will have a major impact on whether or not significant portions of genetic material currently in existence will survive. The ecological reality that habitat destruction has been the functional equivalent of direct extermination is especially evident in urban areas familiar to the Committee, such as the City of New York, where species have been eliminated from formerly ecologically rich areas solely by indirect means. The Committee emphasizes that the preservation of endangered species is an issue of great ecological, medical and economic importance to all Americans. Accordingly, we intend this *amicus curiae* brief to facilitate full development of the issues involved for the Court's review.

SUMMARY OF ARGUMENT

I. The decision below found that the Endangered Species Act (ESA) did not permit imposition of requirements for the protection of endangered species habitat on privately owned lands. The decision was purportedly based on the statutory language which, the court below found, permitted restrictions only on the direct application of force against a member of an endangered species. However, neither the particular term of art created to identify the proscribed activity, "take," its ten definitional descriptors, nor the legislative history of the ESA support imposition of such a direct force requirement in the administration of the ESA.

II. The ruling below would require that publicly-owned lands be required to shoulder the entire burden of endangered species habitat protection. This is inconsistent with Congressional intent and would likely impose stringent new restrictions on recreational and commercial use of public lands. Since loss of habitat due to human intervention is the principal cause of species extinctions, under the ruling below the fate of many endangered and threatened species would depend on the entirely fortuitous circumstance of whether their remaining range was on private or public lands.

III. The decision below is inconsistent with the two-step approach to statutory construction developed in *Chevron*. It also fails to acknowledge Congressional recognition and evident approval of including habitat protection on private lands within the administration of the ESA at the time amendments were made to the statute in 1982.

ARGUMENT

I. THE STATUTORY DEFINITION OF "TAKE" DOES NOT IMPLY A REQUIREMENT OF DIRECT APPLICATION OF FORCE AGAINST AN ENDANGERED SPECIES

The court below concluded that with respect to privately owned lands, the Endangered Species Act (ESA) authorizes regulation only of direct applications of force against

endangered or threatened species. The majority applied the doctrine of *noscitur a sociis* to conclude that the statutory definition of the proscribed activity "take" does not permit restrictions on habitat modifications for purposes of endangered species preservation.

Respondents confine their challenge to a claim of overbreadth in the Fish and Wildlife Service (FWS) definition of "harm" appearing at 50 CFR § 17.3. Yet of the ten descriptors of "take" set forth by Congress in 16 USC § 1532 (19) ("harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"), at least four have normal, everyday meanings that cannot be fairly presumed to require direct force. The terms "harass," "harm," "pursue," and "kill" are all equally receptive to either direct or indirect means of commission.[1]

Analogies to assault statutes and similar legislation and even common law principles of nuisance aimed at protecting a far from endangered species, homo sapiens, are also helpful. Indeed, such analogies were examined by the court below, albeit with inconclusive results. 17 F.3d at 1464-65. There can be little doubt that when applied to conduct among humans, such terms

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[1] Respondents' legal arguments focus exclusively on the "harm" descriptor and ignore clear legislative history supporting a Congressional intent to include habitat modifications within the activities proscribed by the "take" descriptor "harass." The House Report on the ESA states:

> ['Take'] includes harassment, whether intentional or not. This would allow for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.

H.R.Rep. No. 412, 93d Cong. 1st Sess. 11 (1973). Similarly, one can harm an animal by eliminating its food supply, kill it by poisoning its water supply, or pursue it by increased human traffic near its foraging area.

If temporary intrusions such as birdwatching which can be shown to be causally linked to interruption of breeding patterns were intended to qualify as "takes," then the timbercutting at issue here was intended by Congress to be proscribed as well.

as harass, harm, pursue or kill would interdict actions adversely affecting habitat or personal environment such as destruction of housing, withholding of food, forced relocations, arson, release of hazardous substances, or creating excessive noise. Indeed, extensive regulation of activities affecting interactions among humans have been found statutorily authorized by legislation which might initially be understood to address only direct bodily harm.

The FWS has not, however, given such broad meanings to these terms in its ESA "take" regulations. Rather, the FWS rules require as an essential element of its "harm" definition that there be an evident chain of causation leading from prohibited conduct to "actual [] kills or injur[ies to] wildlife," 50 CFR § 17.3. *See Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1108-10 (9th Cir. 1988); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991). Laws regulating human behavior have not been interpreted as narrowly.

Thus the FWS regulations implementing sections 3 (19) and 9 (a) (1) of the ESA do not go beyond the ordinary meaning of the terms utilized in the legislation. The terms employed cannot be fairly read to require direct application of force. Indeed, the FWS has interpreted the statute more narrowly than necessary by conservatively incorporating two requirements which limit potential overbreadth in the application of the "take" concept to habitat modifications: (1) a requirement of actual death or injury to a member of an endangered species, and (2) a demonstrable causal relationship between that death or injury and the activity subject to restraint.

When the court of appeals majority ruled that the statutory term "take" could not embrace habitat modification, it applied to the organisms protected by the ESA standards which are different from those which would normally be applied to statutes controlling human conduct. By focusing only on the *actor* and not the *victim*, the court incorrectly limited the scope of the statute from that intended by Congress. In doing so the court seems to be presuming that only the human conduct, not the plant or animal impact, was of importance.

The ESA is not so limited. Indeed, such an orientation is particularly inappropriate given the objectives of the legislation and the interests it seeks to protect. The ESA states that among its purposes is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . . " ESA § 2 (b), 16 USC § 1531 (b). Indeed, the legislative history of the ESA reveals that the intent of Congress was to define takes "in the broadest possible manner to include any conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S.Rep. No. 307, 93d Cong., 1st Sess. 7 (1973).

There is therefore no suggestion in either the text of the ESA or its legislative history that Congress intended takings to be narrowly construed or ecosystem protection confined to the public sector, as respondent contends. Since the implementing regulations adopted by the FWS are quite comfortably within the sphere of the statutory terms selected by Congress, contain death/injury and causation requirements limiting potential for overbreadth, and achieve the expressly stated purpose of the ESA to protect endangered species and conserve the ecosystems upon which their survival depend, they should be sustained.

II. THE COURT OF APPEALS RULING WOULD EFFECTIVELY PLACE STRINGENT NEW LIMITS ON THE USE OF PUBLIC LANDS WHICH ARE CONTRARY TO CONGRESSIONAL INTENT

The ESA as it has been applied since its inception places significant burdens on federal agencies to formulate and implement programs for the preservation and conservation of endangered and threatened species. As all parties to this case have correctly noted, § 7 of the ESA, 16 USC § 1536, imposes comprehensive scoping, documentation and planning responsibilities on federal agencies that are not imposed on the private sector under § 9. Section 7 protection plans take into account the limitations on destruction of habitat imposed by private parties under the settled interpretation of § 9 prior to this case. Comprehensive planning activities are thus keyed to an

affected species, not a parcel of land; they are essentially coextensive with the range of each particular species. The level or degree of effort devoted to ESA protective activities in a national park, for example, is not currently determined in isolation, but on an integrated basis with the level of habitat protection to occur on adjacent private lands. This division of responsibilities is consistent with traditional expectations: the private party is prevented from doing harm; the public party is charged with providing a benefit.

However, if habitat preservation responsibilities are henceforth to fall exclusively upon federal agencies and cooperative state projects receiving federal funding, then new and potentially vast habitat protection responsibilities will be imposed upon the public sector. These duties are far beyond those governments have been called upon to bear under the more balanced and geographically neutral interpretation of habitat protection responsibilities that the ESA has received during its first 20 years. Thus logging, grazing and mining activities on public lands heretofore permitted under comprehensive protection plans embracing both private and public habitat may now become inadequate to accomplish the species protection objectives of the ESA. Indeed, this very claim has already been asserted in *Seattle Audubon Soc'y v. Espy*, Civ. No. 92-479WD (W.D. Wash.). This massive shift of endangered species protection responsibilities onto public agencies, promising potentially dramatic new restrictions on the use of public lands, is a necessary implication of the construction given the ESA by the decision below that cannot easily be squared with Congressional intent.

The confinement of restrictions on habitat destruction under the ESA to public lands would also produce erratic, random and entirely fortuitous results in efforts to protect specific species as well. It is widely recognized and accepted that the currently existing geographic range of many endangered species has diminished substantially as a result of human intervention. In some instances the rate of shrinkage is accelerating, see, *e.g.*, the Draft National Biological Survey, discussed in The New York Times, February 14, 1995, at 1 col. 5. The current range

of some endangered species is so reduced that it can be expressed in acres. *Ibid.* However, under the decision below, survival of many endangered species, and success in meeting the ESA goal of preserving them, would depend upon the pure happenstance of whether the current existing range of a particular species happened to be located on public or private property. Protection of breeding, feeding and sheltering activities could only be required on the former while private parties would be free to burden the species and thwart public efforts. It is difficult to ascribe to Congress such a patchwork program of protection, in which the very fate of many species will be preordained largely by geography and land ownership patterns.

III. AN EVALUATION OF THE CHALLENGED REGULATIONS UNDER *CHEVRON*, BUTTRESSED BY THE 1982 LEGISLATIVE AMENDMENTS, SUPPORTS THE ADMINISTRATIVE INTERPRETATION OF THE ACT AS AUTHORIZING RESTRICTIONS ON DESTRUCTION OF HABITAT

Under the standard approach to statutory interpretation set forth in *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the question for the Court in the presence of Congressional silence or ambiguity with respect to the specific issue "is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843 (footnote omitted). In such an instance the agency's regulatory choices "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Ibid.*

In this case, the decision below demurs on whether its interpretation rests on the first step of *Chevron*, the presence of Congressional silence or ambiguity, or the second step, *viz.* arbitrary, capricious, or manifestly contrary to the statutory language. The opinion instead concluded that "the exact point where an agency interpretation falls down may be unclear." 30 F.3d at 193.

As set forth above, no fewer than four of the statute's ten descriptors of the proscribed activity "take" accommodate by their natural meaning either a direct or indirect means of accomplishment. In addition, the legislative history at the time of enactment makes clear that the "take" concept should be construed "in the broadest possible manner." S.Rep. No. 307, 93d Cong., 1st Sess. 7 (1973). Moreover, in implementing its regulatory program the FWS has conservatively required demonstration of a causal linkage between, in this instance, an objectionable habitat modification and actual death or injury to wildlife. Thus the "clear determination by Congress" that § 9 of the Act "should not reach habitat modifications," 30 F.3d at 193, is not evident at all.

Moreover, it is all the more difficult to ascribe such a conscious intent to Congress when an interpretation of "takes" that failed to include restrictions on habitat destruction would deprive the ESA of its essential purpose of arresting extinctions and assuring the survival of endangered species. The logic of the court below presumes that in both 1973 and 1982 the Congress was either ignorant of the critical role of habitat preservation in accomplishing the purposes of the ESA or intentionally enacted and subsequently amended a statute which would be ineffectual and contained the seeds of its own lack of success.

What is indisputable is that in 1982 Congress revisited the ESA, and specifically addressed the function of a "take" in § 9 implementation. In amendments to the ESA enacted in 1982, Congress implemented a permitting program authorizing "takes" that would otherwise be prohibited if they were "incidental" and satisfied other environmental requirements. *See* ESA § 10(a)(1)(b), 16 USC § 1539(a)(1)(b). These amendments specifically contemplated the possibility of a "take" by habitat modification, and were aimed at allowing some limited habitat alteration. H.R. Rep. No. 835, 97th Cong., 2d Sess. 30-32 (1982); S. Rep. No. 418, 97th Cong, 2d Sess. 10 (1982).

The court below disregarded the significance of the 1982 amendments on the basis that "where Congress adopts

amendments on the basis of a misconception as to the meaning of a prior statute's related provisions, the latter act does not turn the misconception into law." 17 F.3d at 1469. This logic is obviously dependent upon whether the court was correct in its belief that in 1982 there was in fact a Congressional misconception about what "take" and its ten descriptors meant—a belief for which the court had no support. The more likely inference is that by squarely addressing the FWS application of a "take" in specific factual contexts over almost a decade preceding the 1982 amendments, and then proceeding to add an ameliorative feature—the concept of an "incidental take"—Congress necessarily expressed basic satisfaction with the past implementation of the ESA in this area. It is of particular significance that the 1982 amendments were specifically directed at the application by FWS of the "take" principle to the private sector in the context of § 9.

On several prior occasions this Court has acknowledged that Congressional re-enactments and/or amendments to pre-existing statutory framework are useful indicators of approval of administrative interpretation and application. *Lindahl v. OPM*, 470 U.S. 768, 782 & n.15, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985) ("[T]he fact that Congress amended [the statute] in 1980 without explicitly repealing the established [construction standard] itself gives rise to a presumption that Congress intended to embody [the standard] in the amended version of [the statute]."); *U.S. v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 132-35, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978); *Albemarle Paper Co. v Moody*, 422 U.S. 405, 414 n.8, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). This Court has even inferred approval of administrative or judicial constructions of legislative language from mere Congressional inaction in amending the underlying legislation. *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987). While such cases by no means suggest that subsequent Congressional enactments can resuscitate a regulation which clearly has no statutory underpinnings, in this instance virtually the only inference that can be drawn from Congress' purposeful decision to amend the ESA to create permissive private sector

exemptions for "incidental takes" is that in doing so Congress simultaneously expressed its approval of the underlying regulatory definition. Cf. *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 137-39, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

By enacting the 1982 amendments to the ESA, Congress adjusted the very manner in which the regulation of "take" was being administered and left other integral features of the § 9 "take" concept untouched. Indeed, the legislative history of the 1982 amendments explicitly recognized that a § 9 "take" brought about by habitat modification would be suitable for the "incidental takes" permitting process being established. *See* H.R. Rep. No. 835, 97th Cong., 2d Sess. 30-31 (1982) and S.Rep. No. 418, 97th Cong., 2d Sess. 10 (1982). These circumstances alone belie any "clear determination by Congress that the prohibitions of § 9 should not reach habitat modifications." 30 F.3d at 193. Rather, all indications favor the view that the FWS's inclusion of restrictions on habitat destruction within the purview of the ESA is entirely consistent with Congressional intent.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the judgment below of the United States Court of Appeals for the District of Columbia Circuit be reversed.

February 21, 1995

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